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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board	)	
on Universal Service	)	CC Docket No. 96-45
	)	
Petition by the Colorado Public Utilities	)	
Commission, Pursuant to 47 C.F.R.	)	
Section 54.207(e), for Commission	)	
Agreement in Redefining the Service	)	
Area of Wiggins Telephone Association	)	
Inc., a Rural Telephone Company	)	

To: Chief, Wireline Competition Bureau

N.E. COLORADO CELLULAR, INC.
REPLY COMMENTS IN SUPPORT OF COPUC PETITION

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SUMMARY

The Colorado Public Utilities Commission's ("COPUC") proposal to redefine the service area of the Wiggins Telephone Association, Inc. ("WTA") will serve both to promote competition and to preserve and advance universal service. As COPUC explains in its Petition, it would be unreasonable to expect competitive ETCs to provide service throughout all WTA wire centers, some of which are noncontiguous, as a precondition to receiving vital support to upgrade infrastructure and compete for primary service. Because the current configuration of WTA's service area constitutes a barrier to competitive entry, COPUC's proposal wisely reclassifies each wire center as a separate service area. The FCC has concurred with several state proposals in prior decisions granting the exact same relief.

WTA and the National Telecommunications Cooperative Association ("NTCA") fail to raise any issues that would justify delaying or denying COPUC's Petition. Both commenters focus most of their arguments on "cream skimming" concerns, yet WTA's Path 2 disaggregation has substantially removed opportunities for competitors to receive high levels of support in relatively low-cost areas. Additionally, NTCA attempts to shoehorn a new "public interest" test into the service area redefinition process, even though the applicable statutory provision contains no such test and the issue was decided with finality at the state level. Finally, both commenters raise a host of anticompetitive arguments that have nothing to do with the discrete issue of service area redefinition and, in any event, have no merit.

Because COPUC's proposed service area redefinition removes barriers to competition, properly considers the recommendations of the Joint Board, and will not harm any party, the FCC should grant its concurrence and allow the proposal to become effective without further action.

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N.E. Colorado Cellular, Inc. ("NECC"), by counsel, hereby submits the following Reply Comments pursuant to the Commission's *Public Notice* in the above captioned proceeding.[1] The Wiggins Telephone Association, Inc. ("WTA") and the National Telecommunications Cooperative Association ("NTCA") filed comments.

I. INTRODUCTION

The proposal by the Colorado Public Utilities Commission ("COPUC") to redefine WTA's service area[2] will remove barriers to competitive entry and promote the statutory goal of preserving and advancing universal service. COPUC's Petition, as well as the record from relevant proceedings at the state level, reflects that the recommendations of the Federal-State Joint Board on Universal Service ("Joint Board") regarding service area redefinition were duly

[1] The Colorado Public Utilities Commission Petitions to Redefine the Service Area of Wiggins Telephone Association, Inc. in the State of Colorado, *Public Notice*, CC Docket No. 96-45, DA 03-1957 (rel. June 13, 2003) ("*Public Notice*").

[2] Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of Wiggins Telephone Association, a Rural Telephone Company, CC Docket No. 96-45 (filed May 30, 2003) ("Petition").

considered and that the proposed redefinition is fully justified. All affected parties had ample notice and opportunity to participate in the proceeding that led to CPUC's proposal. Moreover, CPUC's proposed redefinition is warranted under the precedent established in prior FCC concurrence decisions, and it is consistent with service area redefinition proposals adopted by numerous state commissions.

Neither WTA nor NTCA has raised any issue of importance that would justify opening a proceeding or otherwise delaying a grant of COPUC's Petition. Both commenters focus heavily on "cream skimming" arguments, even though WTA's Path 2 disaggregation plan minimizes or eliminates opportunities for competitors to receive high levels of support in low-cost areas. Moreover, WTA has inappropriately raised a host of complaints – including a frivolous allegation that NECC's receipt of high-cost support for "cellular handset customers" is somehow inappropriate – – having nothing to do with the discrete issue of service area redefinition that is the subject of COPUC's Petition. The Petition will preserve and advance universal service, ensure consumer choice in rural areas, and serve the public interest. For three years now, NECC has patiently worked through every obstacle that WTA has placed before it. Consumers in WTA's area deserve the same kinds of improvements that NECC is now making in other rural areas where it has been designated as an ETC. Accordingly, the Commission should concur with the COPUC's proposed service area definition, decline to open a proceeding, and allow consumers in WTA's service area to begin to experience the benefits of competition without delay.

II. A GRANT OF COPUC'S PETITION IS WARRANTED UNDER THE ACT AND THE FCC'S UNIVERSAL SERVICE POLICIES

As clearly explained in the COPUC's Petition, the redefinition of WTA's service area along wire center boundaries is needed in order to remove a major obstacle to competitive entry.[3] Specifically, because WTA's service area is noncontiguous and is spread over a large area,

[3] Petition at p. 14.

competitors are unlikely to be able to serve it in its entirety — and therefore must forgo critical high-cost support needed to compete for primary service.[4] This is especially true of wireless carriers, whose license boundaries invariably do not correspond to wireline study-area boundaries. Unless WTA's service area is redefined as proposed in the Petition, consumers throughout WTA's study area will be deprived of the benefits that would result from a competitor accessing high-cost support and using it to invest in infrastructure development. COPUC's Petition includes a thorough analysis of the Joint Board's recommendations and properly concludes that the proposal is justified in light of those recommendations. Because COPUC's proposed redefinition removes artificial barriers that unfairly prevent competitive ETCs from receiving high-cost support as the incumbents do, a grant of the Petition will promote both competitive entry and universal service.

A. The COPUC's Proposed Redefinition Will Promote the Dual Objectives of Competition and Universal Service.

In evaluating petitions for concurrence with service area redefinition, the FCC must follow the congressional mandate to promote new technologies and facilitate competitive entry "in all telecommunications markets."[5] When Congress enacted the Telecommunications Act of 1996 ("Act"),[6] it specifically commanded the FCC to establish a "pro-competitive, de-regulatory national policy framework" designed to accelerate the deployment of advanced telecommunications to all Americans. Congress recognized that the existing system of universal service subsidies — under which incumbent local exchange carriers ("ILECs") had exclusive access to implicit and explicit universal service subsidies — could not be justified in a regulatory environment that sought to foster competition.[7] Therefore, Congress directed the FCC to reform

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[4] *See id.*

[5] *See* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113.

[6] Pub. L. No. 104-104, 110 Stat. 56 (1996). The Act amends the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

[7] *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999) ("*TOPUC*") ("Because opening local telephone markets to competition is a principal objective of the Act, Congress recognized

the system to ensure that universal service subsidies become explicit, predictable, and sufficient to achieve the purposes of the Act.[8]

Soon after the passage of the Act, the FCC reaffirmed Congress's assessment of the necessity of making universal service subsidies transparent and accessible to competitors. In the *Local Competition Order*, the FCC stated:

> The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.[9]

To remedy this competitive disparity, the FCC ruled that the principle of competitive and technological neutrality would guide the formulation of its universal service policies.[10] Specifically, the FCC declared:

> Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.[11]

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that the universal service system of implicit subsidies would have to be re-examined.").

[8] 47 U.S.C. §§ 253(b)(5), 254(e).

[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15506-07 (1996) ("*Local Competition Order*").

[10] *See generally*, CC Docket No. 96-45; *see also, Notice of Proposed Rulemaking and Order Establishing Joint Board*, 11 FCC Rcd 18092 (1996); *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776 (1997) ("*First Report and Order*"); *Ninth Report and Order and Eighteenth Order on Reconsideration*, 14 FCC Rcd 20432 (1999) ("*Ninth Report and Order*"); *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 (2001) ("*Fourteenth Report and Order*").

[11] *First Report and Order, supra*, 12 FCC Rcd at 8801.

The FCC has consistently reaffirmed the pro-competitive goals of its universal service and ETC designation policies,[12] and it recently confirmed that "[c]ompetitive neutrality is a fundamental principle of the Commission's universal service policies."[13]

The service area redefinition provisions of the Act and the FCC's rules ensure that the principle of competitive neutrality is served when new ETCs seek to serve an area that differs from an ILEC's study area. Specifically, Section 214(e)(5) of the Act states:

> In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of the Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company.[14]

To ensure that the Joint Board's recommendations are properly considered while minimizing administrative delay that would hinder competitive entry, the FCC adopted a streamlined federal-state process for redefining service areas pursuant to Section 214(e)(5) of the Act.[15] Specifically, after being subjected to notice and comment, a state's proposal to redefine a LEC service area automatically becomes effective 90 days after the proposal is placed on public notice, unless there are unusual circumstances that require further consideration in a new notice-and-comment proceeding. On multiple occasions, the Commission has utilized this procedure to consider

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[12] *See, e.g., Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133, 18137 (2001) ("Designation of qualified ETCs promotes competition and benefits consumers by increasing customer choice, innovative services, and new technologies."); *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48 (2000) ("[C]ompetition will result not only in the deployment of new facilities and technologies, but will also provide an incentive to the incumbent rural telephone companies to improve their existing network to remain competitive, resulting in improved service to Wyoming consumers. In addition, we find that the provision of competitive service will facilitate universal service to the benefit of consumers . . . by creating incentives to ensure that quality services are available at 'just, reasonable, and affordable rates.'") (footnote omitted).

[13] *Guam Cellular and Paging, Inc., Petition for Waiver of Section 54.314 of the Commission's Rules and Regulations*, CC Docket No. 96-45, DA 03-1169 at ¶ 7 (Tel. Acc. Pol. Div. rel. April 17, 2003).

[14] 47 U.S.C. § 214(e)(5).

[15] *See* 47 C.F.R. § 54.207(c)(3)(iii). *See also First Report and Order, supra*, 12 FCC Rcd at 8881.

requests for concurrence with proposed rural ILEC service area redefinitions, granting its concurrence and allowing the redefinition to take effect.[16]

Consistent with federal universal service objectives, COPUC's Petition properly seeks to redefine WTA's service area in a competitively neutral manner. As COPUC explained in its Petition:

> The size of WTA's service area is such that potential new entrants will find it burdensome to serve the entirety of that area at once. Under federal law, any telephone company seeking certification as a competitive ETC in WTA's service area must stand ready to provide supported services throughout the entirety of WTA's expansive service area. That requirement is excessively burdensome for any potential new entrant.[17]

Commercial mobile radio service ("CMRS") providers like NECC are restricted to serving those areas within their FCC-authorized Cellular Geographic Service Area ("CGSA"), which generally does not correspond to the rural LEC study area boundaries. Thus, when a CMRS carrier serving customers within a rural LEC study area seeks designation as an ETC, it cannot be designated, and therefore cannot receive any high-cost support, unless the state and the FCC agree to redefine the affected rural LEC's service area. In fact, if such service area redefinition does not occur, CMRS carriers will be effectively precluded from competing in those areas solely because of the technology they use. In order to address this potential barrier to competitive entry, the Act envisions the designation of a competitive ETC's service area along boundaries that are not identical to LEC wire center boundaries.[18]

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[16] *See, e.g., Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. on Tribal Lands within the State of Arizona*, DA 01-409 (WCB rel. Feb. 15, 2001); *Smith Bagley, Inc. Petitions to Redefine the Service Area of Table Top Telephone Company on Tribal Lands within the State of Arizona*, DA 01-814 (WCB rel. April 2, 2001); *Smith Bagley, Inc. Petitions to Redefine the Service Area of CenturyTel of the Southwest, Inc. in the State of New Mexico*, DA 02-602 (WCB rel. March 13, 2002).

[17] Petition at p. 2.

[18] *See First Report and Order, supra*, 12 FCC Rcd at 8879-80 ("...if a state adopts a service area that is simply structured to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS-based provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage.").

By redefining the service area along wire center boundaries, the Commission and COPUC will thus remove the last obstacle facing competitive carriers seeking to provide consumers in WTA's service area with high-quality service and an array of pricing plans as a real competitive alternative to LEC service. COPUC's proposal thus will serve the public interest and should be granted expeditiously.

B. *The Petition and the* Record at the State Level Provide Ample Evidence that COPUC's Redefinition Proposal Takes the Joint Board's Recommendations Into Account.

The requirements for redefining a rural ILEC service area are straightforward. Specifically, under Section 214(e)(5), a service area may be redefined as something other than an ILEC's study area if "the Commission and the States, after taking into account recommendations of a Federal-State Joint Board ... establish a different definition of service area for such company."[19] After conducting its own analysis and concluding that redefinition is justified, a state must seek the FCC's concurrence by submitting a petition that includes: (1) a description of the proposed redefinition; and (2) the state commission's ruling or other statement presenting the reasons for the proposed redefinition, including an analysis that takes the Joint Board's recommendations into account.[20]

Consistent with this requirement, the COPUC Petition provided both a description of the proposed redefinition[21] and an analysis of the proposed redefinition under the framework provided in the Joint Board's recommendations. Specifically, with regard to the Joint Board's recommendations, the Petition explains that (1) the Joint Board's concerns regarding uneconomic receipt of high levels of support in low-cost areas (commonly referred to as "cream

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[19] 47 U.S.C. § 214(e)(5).

[20] 47 C.F.R. § 54.207(c)(1).

[21] *See* COPUC Petition at pp. 5 ("... Petitioner now seeks Commission agreement to designate each individual wire center of WTA as a separate service area for the purpose of designating competitive ETCs in WTA's territory, *consistent with the Path 2 method for disaggregating* WTA's universal service support."), 7 ("COPUC now suggests that each of WTA's five wire centers included in the four WTA exchanges be designated as separate service areas.")

skimming") are "minimized, if not eliminated" by the more accurate breakdown of support effectuated by WTA's Path 2 disaggregation;[22] (2) the proposed redefinition takes into account the special status of rural carriers under the Act;[23] and (3) COPUC's proposed redefinition will not impose any undue administrative burden on WTA, since it already has the ability to calculate support down to the wire-center level (and in fact has already done so).[24] COPUC's Petition also provides a detailed account of the proceedings below, which laid the groundwork and provided a sound basis for COPUC's proposals.

WTA and NTCA primarily center their arguments on "cream skimming". Yet, COPUC clearly set forth the reason why its redefinition proposal does not raise "cream skimming" concerns: WTA's disaggregation plan substantially removes the potential for competitors to receive uneconomic levels of support. Specifically, COPUC stated:

> [T]he Settlement agreed to by WTA in its Path 2 application before COPUC: (1) disaggregates WTA Study Area support according to WTA's five wire centers; (2) allocates support to four zones per wire center; and (3) allocates support per line in each wire center area and per zone for Universal Service Fund support, Long Term Support, Interstate Common Line Support, and [Local Switching Support].
>
> * * *
>
> In light of these provisions, the possibility of cream skimming by competitive ETCs in WTA's service territory has been minimized, if not eliminated. Competitive ETCs will not be eligible for universal service support at a uniform amount per access line throughout WTA's territory. If they choose to serve in WTA's lower cost wire centers only, they will receive support at lower amounts per access line.

Given the disaggregation and targeting of WTA's support, it is difficult to understand why WTA and NTCA still claim to have "cream skimming" concerns. Both commenters rely on

[22] *See* Petition at pp. 12-13.

[23] *See id.* at pp. 12-13.

[24] *See id.* at p. 13.

pure speculation and fail to provide any explanation of potential "cream skimming" scenarios. Indeed, WTA appears to misunderstand its own disaggregation plan, arguing that "the putative competitor [NECC] cannot serve WTA's three highest cost service area locations and can only serve in a portion of the Hoyt disaggregation center."[25] Not so. WTA's Hoyt and Wiggins wire centers, which NECC can serve, receive the lowest per-line support out of all WTA wire centers.[26] In a COPUC proceeding to disaggregate local switching support ("LSS"), WTA won COPUC approval to allocate the lowest levels of LSS to Hoyt and Wiggins even though WTA's entire study area is served by a single switch.[27]

NTCA fails to provide any factual support for its assertion that the proposed redefinition "may irreparably harm rural telephone companies and the customers they serve."[28] NTCA vaguely claims it is "*entirely possible*" that the lowest cost portion of a service area is the only area where a wireless carrier is licensed to serve.[29] Raw conjecture of this sort cannot form the basis for rejecting a redefinition proposal. Moreover, NTCA's generalized, speculative statements are not followed by *any* discussion of the facts in this case. For example, NTCA could have analyzed WTA's disaggregation plan as it relates to NECC's licensed service area by examining the publicly available materials from the WTA disaggregation docket, relevant

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[25] WTA Comments at pp. 9-10.

[26] *See* Application of Wiggins Telephone Association for Approval of its Disaggregation Plan, Docket No. 02A-276T, Stipulation and Settlement Agreement (filed Oct. 16, 2002).

[27] *See* Application of Wiggins Telephone Association for Approval of its Disaggregation Plan, Docket No. 02A-276T, Recommended Decision of Administrative Law Judge Ken F. Kirkpatrick Accepting Stipulated Disaggregation Plan, Decision No. R02-1409 (mailed Dec. 13, 2002); Decision Denying Exceptions, Decision No. C03-0243 (mailed Mar. 5, 2003). Both decisions, as well as the Stipulation and Settlement Agreement, are attached to COPUC's Petition as Exhibit C.

[28] NTCA Comments at p. 3.

[29] *See id.* (emphasis added).

portions of which were attached to COPUC's Petition. Had NTCA done so, it would have discovered that WTA's disaggregation plan largely forecloses "cream skimming" opportunities – even those of the "accidental" variety. But NTCA does not even bother to explore the facts.

Even if WTA or NTCA managed to demonstrate that COPUC's redefinition proposal creates a potential for "cream skimming", current FCC and COPUC rules provide an effective remedy. WTA may file a petition, or COPUC may open a proceeding on its own motion, to modify the disaggregation plan that is currently in effect. *See* 47 C.F.R. § 54.315(c)(5); 4 C.C.R. 723-42-10.2.5. Thus, if WTA is concerned that there is still a possibility of "cream skimming", its appropriate avenue of redress is before COPUC, not in a service area redefinition proceeding.

In short, COPUC's redefinition proposal is fully warranted under the three-part analysis provided in the Joint Board's recommendations. As both the FCC and COPUC have emphasized, the opportunity by LECs to file disaggregation plans should lay to rest any concerns regarding the potential for "cream skimming" by a competitor.[30] WTA and NTCA have provided only speculation and factual misstatements in support of their "cream skimming" arguments. Because those arguments have no basis in fact, they should be rejected.

C. NTCA Confuses the Federal-State Service Area Redefinition Process Under Section 214(e)(5) with the State's "Public Interest" Determination Under Section 214(e)(2).

NTCA demonstrates its fundamental misunderstanding of the service area redefinition process by arguing that the FCC must conduct "a case-by-case public interest analysis" in service

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[30] *See Federal-State Joint Board on Universal Service, Petitions for Reconsideration of Western Wireless Corporations' Designation as an Eligible Telecommunications Carrier in the State of Wyoming, Order on Reconsideration*, CC Docket No. 96-45, FCC 01-311 at ¶ 12 (rel. Oct. 19, 2001); In the Matter of the Proposed Amendments to the Rules Concerning the Colorado High Cost Support Mechanism, 4 CCR 723-41, and the Rules Concerning Eligible Telecommunications Carriers, 4 CCR 723-42, Ruling on Exceptions and Order Vacating Stay at pp. 14-15 (COPUC, mailed Mar. 18, 2002).

area redefinition proceedings.[31] The "public interest" ramifications of designating NECC throughout its requested service area have already been determined by the COPUC pursuant to Section 214(e)(2), which gives COPUC exclusive jurisdiction over NECC's designation as an ETC.[32] Specifically, when NECC was designated, it was determined that "designation of Applicant as an Eligible Telecommunications Carrier is in the public interest"[33] and that "NECC . . . should be granted such status immediately" pending the outcome of the CPUC's generic disaggregation proceeding and "any necessary FCC approval of initial disaggregation [i.e., redefinition] of service areas[.]"[34]

COPUC properly resolved the public interest question in determining NECC's eligibility to be an ETC under Section 214(e)(2), and the instant proceeding is governed by a very different set of legal requirements. Service area redefinition under Section 214(e)(5) does not require a public interest determination. Indeed, Section 214(e)(5) does not contain the words "public interest" or any other language suggesting a reevaluation of the state's decision. Rather, the only requirement under that section is that the FCC and the states take into account the recommendations of the Joint Board. Thus, the FCC's role is to decide whether the state commission has shown that it properly considered the Joint Board's recommendations, and to grant its concurrence unless there are unusual circumstances suggesting that the proposal does not pass muster in light of those recommendations. As demonstrated *supra*, no party has demonstrated that the Joint Board's recommendations were not properly considered, or that such

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[31] NTCA Comments at p. 4.

[32] N.E. Colorado Cellular, Inc., Docket Nos. 00A-315T, 00A-491T, Decision No. R01-1298, Recommended Decision of Administrative Law Judge William J. Fritzel Approving Stipulation and Settlement Agreement (mailed Dec. 21, 2001) ("*ALJ Decision*") at p. 6.

[33] *Id.*

[34] *Id.*, Exh. 1 at pp. 6-7.

circumstances are present.

A *de novo* public interest analysis by the FCC is neither necessary nor permitted by statute. By conflating the provisions of Sections 214(e)(2) and 214(e)(5), NTCA inappropriately seeks to blur the explicit statutory distinctions between federal and state authority contained in the Act. The FCC should reject NTCA's attempt to invent a "public interest" test for redefinition where the statute provides none.

III. SPECULATION ABOUT POSSIBLE RULE CHANGES CANNOT JUSTIFY DELAY OR DENIAL OF COPUC'S PETITION

Both WTA and NTCA inappropriately utilize the ongoing consideration of modifications to the high-cost universal service program by the FCC and the Joint Board[35] to argue, in effect, that all proceedings must be suspended until the Commission develops rules that are more ILEC-friendly.[36] These attempts to prevent the application of validly adopted FCC rules must be rejected. The service area redefinition procedures embodied in the FCC's rules were adopted after being duly subjected to notice and comment in a full rulemaking proceeding and withstood a challenge in federal court. Existing rules must be applied as written, until such time as they are changed through appropriate rulemaking procedures.

Even assuming the FCC's existing rules and policies could be ignored as the incumbent LECs suggest, neither WTA nor NTCA has adequately explained how the ongoing FCC and Joint Board proceedings would affect the merits of COPUC's Petition. Neither commenter even suggests what sort of rule changes may occur or why such modifications would be relevant to

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[35] *See Federal-State Joint Board on Universal Service, Order*, CC Docket No. 96-45, FCC 02-307 (rel. Nov. 8, 2002) ("*Referral Order*"); Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process, CC Docket No. 96-45, FCC 03J-1 (rel. Feb. 7, 2003); *Notice of Proposed Rulemaking*, FCC 03-13 (rel. Feb. 25, 2003).

[36] *See* WTA Comments at pp. 10-11; NTCA Comments at pp. 6-8.

this proceeding. WTA only refers to the Joint Board's request for comment on (1) "the application of the 'public interest' test as . . . applied in rural company service areas" and (2) "the portability of federal support"[37] -- issues that relate to eligibility criteria and payment methodologies, not the definition of "service area". NTCA mentions that the FCC is considering "to what extent the FCC should provide additional guidance on the impact of the disaggregation of support on the designation of a service area other than the ILEC's study area"[38] but fails to articulate what kind of "guidance" is needed for the instant case.

Indeed, given the fact that COPUC explicitly based its redefinition proposal on WTA's disaggregation plan, it is difficult to imagine what kind of "guidance" would compel the rejection of the proposed service area redefinition. Accordingly, the only practical effect of suspending the FCC's concurrence with COPUC's proposal would be to forestall competitive entry, delay the advancement of universal service, and protect incumbents, each of which is contrary to the goals of the 1996 Act.

IV. WTA'S "CELLULAR HANDSET" ARGUMENT IS PATENTLY FRIVOLOUS

WTA's statements concerning NECC's receipt of high-cost support for its "cellular handset customers" are completely groundless, misrepresent basic facts in the record of proceedings before COPUC, and do not provide any reason to delay or deny COPUC's proposed redefinition.[39]

The Stipulation and Settlement Agreement ("Stipulation") that is a part of NECC's ETC grant contains a statement of applicable terms and conditions and a description of its initial basic

[37] WTA Comments at p. 6.

[38] NTCA Comments at p. 7.

[39] *See* WTA Comments at pp. 3-4, 13.

universal service ("BUS") offering.[40] The Stipulation provided that, upon an informational filing with COPUC, "[a]dditional offerings, at different rates and with different features, may be offered by NECC according to the terms of this Stipulation."[41] In accordance with that Stipulation, NECC has made several filings since its designation to specify additional universal service rate plans containing services and features from which its customers can choose.

WTA's assertion that NECC was designated only for "the telecommunications ETC version of fixed wireless (wireless local loop)" and that "NECC subsequently claimed entitlement to support based on traditional wireless customer service plans employing half-watt handsets" is patently false.[42] COPUC has specifically approved many rate plans for which NECC receives high-cost support. NECC's designation has never been limited to wireless local loop technology.

WTA's decision to raise frivolous allegations of this sort in a service area redefinition proceeding is difficult to fathom. There are ample enforcement mechanisms — including possible denial of state certification in any given year — to address WTA's purported concerns even if they were true. The proposed redefinition of WTA's service area will not remove or diminish those mechanisms in any way. In short, WTA's arguments regarding "cellular handset customers" are based on WTA's inaccurate characterization of state-level proceedings and have no bearing on the redefinition issue. Accordingly, these arguments should be summarily rejected.

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[40] *See ALJ Decision, supra.*

[41] Stipulation at p. 10.

[42] WTA Comments at p. 13.

V. COMMENTERS' BROAD POLICY ARGUMENTS ARE NOT GERMANE TO THIS PROCEEDING, AND IN ANY EVENT MUST BE REJECTED

WTA and NTCA have used this comment cycle to present an "ILEC wish list" – masquerading as a plea for regulatory parity – that extends well beyond the scope of COPUC's Petition. This is no accident; WTA and other ILECs appear intent upon seizing any and every proceeding concerning competitive ETCs to advance their anticompetitive agenda of keeping competitors from breaking their monopolies. To the extent WTA and NTCA wish to roll back the provisions of the Act and the FCC's rules that ensure competitive neutrality and sufficiency of support, such arguments – however misguided — are best raised in ongoing and future FCC proceedings to refine its rural universal service policies. Because WTA and NTCA have chosen an inappropriate forum for their programmatic concerns, NECC will respond only to the more egregious claims below:

A. "Windfall" Support.

WTA's assertion that a competitive ETC's receipt of support based on an incumbent's costs may constitute a "windfall"[43] ignores the fact that if most competitive ETCs were paid on their own costs, they would be collecting far more support than they are under the current program. In almost all instances and for any given area, the competitive ETC has fewer lines than the incumbent over which to spread its costs. Moreover, a competitor's initial outlays to improve network facilities are much greater at the outset, meaning that competitive ETCs may not obtain sufficient support when they begin to carry out their ETC obligations. If each wireless carrier is permitted to submit costs to justify network construction sufficient to compete with an ILEC, the high-cost mechanism will result in duplicate networks and consume far more high-cost support than the current system. Wireless carriers do not receive a windfall and since support

[43] *See id.* at p. 7.

must be channeled to facilities, any excess support only serves to accelerate construction of high-quality networks in areas that would not otherwise have an alternative service provider.

B. Equal Access.

Both WTA and NTCA ignore[44] the outright statutory prohibition in Section 332(c)(8) against imposing equal access requirements on CMRS providers like NECC. There is no "universal service" exception to this prohibition, as the FCC affirmed in last year's *Kansas BUS Order*.[45] Moreover, imposing equal access would only detract from funding improvements in network reach and quality, and it would hurt consumers, who benefit from the all-in-one plans that provide low long distance rates. The incumbent LECs' pretended concern for consumer welfare is particularly ironic, considering that it is the high intraLATA toll charges imposed by wireline LECs who limit local calling areas that often prompt consumers to "go wireless" in the first place.

C. Growth of the High-Cost Fund.

NTCA, while expressing concern regarding the "sustainability of the universal service high cost fund",[46] fails to provide any estimates as to how COPUC's proposal will affect the size of the high-cost fund. More important, NTCA fails to take account of the fact that, when an incumbent LEC is forced by competition to reduce its costs and become more efficient, overall funding levels decrease. Finally, NTCA ignores the greatest contributor to fund growth – the payment of inefficiently high support levels to incumbent LECs based on their embedded costs.

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[44] *See id.* at p. 15; NTCA Comments at p. 7.

[45] *See Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802, 14819 (2002) ("*Kansas BUS Order*").

[46] *See* NTCA Comments at pp. 6, 8.

VI. CONCLUSION

The redefinition of WTA's service area along wire center boundaries is warranted for precisely the same reasons the FCC concurred with a similar plan proffered by the Washington Utilities and Transportation Commission in 1999. In that case, the FCC concluded:

> [O]ur concurrence with rural LEC petitioners' request for designation of their individual exchanges as service areas *is warranted in order to promote competition*. The Washington Commission is *particularly concerned that rural areas . . . are not left behind in the move to greater competition*. Petitioners also state that designating eligible telecommunications carriers at the exchange level, rather than at the study area level, will promote competitive entry by permitting new entrants to provide service in relatively small areas . . . *We conclude that this effort to facilitate local competition justifies our concurrence with the proposed service area redefinition*.[47]

As in the Washington case, COPUC's proposal seeks to ensure that consumers in WTA's service area are not left behind as competition is introduced throughout the country in accordance with the 1996 Act. In the time since that decision was adopted, the reasons supporting similar redefinition proposals have only become more compelling. WTA's ability to disaggregate support has minimized or eliminated the opportunity for competitors to receive high levels of support in low-cost areas. At the same time, competitors face long, costly delays in attempting to receive support on par with incumbent LECs, and competition has only begun to emerge in rural areas. COPUC's proposal will help level the playing field so competitors like NECC can use high-cost support to bring quality alternative service to rural consumers.

For the reasons stated above, the FCC should permit COPUC's Petition to become effective without further action.

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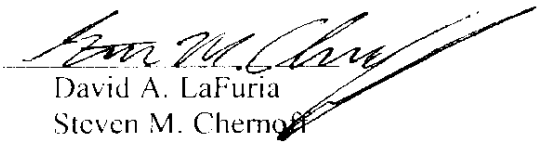
[47] *Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable*

Respectfully submitted,

N.E. COLORADO CELLULAR, INC.

By: 
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July 14, 2003

Federal Universal Service Support, Memorandum Opinion and Order, 15 FCC Rcd 9924, 9927-28 (1999).

CERTIFICATE OF SERVICE

I, Janelle T. Wood, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 15th day of July, 2003, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *N.E. COLORADO CELLULAR, INC. REPLY COMMENTS IN SUPPORT OF COPUC PETITION* filed today to the following:

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